Hasibullah bin Mohd Ghazali v Public Prosecutor

SUPREME COURT (KUALA LUMPUR) — CRIMINAL APPEAL NO 05-96-91
GUNN CHIT TUAN CJ (MALAYA), MOHAMED AZMI AND EDGAR JOSEPH JR SCJJ
14 SEPTEMBER 1993

Evidence *— Confession — Voluntariness — Alleged confession statement made to police officer — Whether appellant did make alleged confession attributed to him — State of mind of accused when alleged statement was obtained — Prosecution to prove beyond any reasonable doubt that confession was voluntary*

Evidence *— Confession — Whether there were oppressive circumstances under which the confession was alleged to have been made — Whether improper admission of alleged confession was gravely prejudicial to appellant, causing miscarriage of justice*

Criminal Procedure *— Trial — Charge of possession of dangerous drugs — Judge failed to mention significant evidence which could cast doubt on prosecution case — Failure to do so was a misdirection by way of non-direction*

A team of police officers led by Insp Giam ('Giam') raided the house the appellant and two other accused were in, on suspicion that it was being used for the trafficking in ganja. In one of the rooms ('the room'), which the appellant acknowledged was his, the officers found leaves and dried twigs suspected to be ganja. It was alleged that appellant had also claimed that all the things in the bedroom were his. Giam then claimed that he had administered the statutory caution under s 37A of the Dangerous Drugs Act 1952 ('the Act') in Bahasa Malaysia to the appellant.

The appellant was convicted of an offence under s 39B(1)(a) of the Act and was sentenced to death while the other two accused were acquitted and discharged. The appellant challenged the admissibility of the alleged incriminating replies made by the appellant to the questions put by Giam on three separate grounds:

(a) that no caution in the statutorily prescribed form as alleged by Giam had been administered by the appellant;
(b) that apart from the replies made by the three accused persons to questions to establish their identities, no conversation of any sort had taken place between Giam and the three accused persons; and
(c) that in any event, if any incriminating replies had been made by the appellant to the questions put by Giam, they were not proved to have been voluntarily made.

The trial judge held a trial within a trial at the conclusion of which he admitted the statements. The appellant has appealed.

Held, allowing the appeal:

(1) Giam's testimony as to the alleged confession could not be accepted at its face value but had to be scrutinised with great care and tested against the rest of the evidence and the probabilities of the case.

(2) Although Giam gained access to the room with the help of the appellant who handed him the key, the appellant did not take the key out of his pocket, but lifted it from the nail in the wall of the master bedroom to which all the three accused have had access. Nowhere in his judgment did the judge mention the significance of the evidence, which could raise suspicion of the prosecution's version as to the alleged replies by the appellant. The judge's failure to do so was a misdirection by way of non-direction and the court was of the view that he was wrong therefore in holding that the prosecution had proved beyond doubt that the appellant did make the alleged confession to Giam.

(3) The trial judge was wrong in holding that the alleged confession of the appellant was voluntary for the following reasons:

(a) in deciding the issue of admissibility of a confession made by an accused person, the onus is not on the accused to show involuntariness but on the prosecution to prove beyond any reasonable doubt that the confession was voluntary. The judge in this case had reversed the onus and disregarded the requirement that the prosecution must prove beyond any reasonable doubt that the confession was voluntary;

(b) in deciding whether or not a statement made by an accused person was obtained from him by fear of prejudice or hope of advantage exercised or held out by a person in authority, the cardinal point is not so much the state of mind of the police officer but that of the accused. In holding that the appellant 'must show that he was put in that fear in order that the statement should result' and 'that the appellant was not in that sort of fear the law requires to exclude the statement', the judge excluded from his consideration, the state of mind of the appellant, with all its foibles and fortitude which was most material and instead confined his attention to the intention of Giam; and

(c) the judge held that the refusal of the appellant to sign the paper upon which Giam had recorded the replies allegedly made by the appellant to his questions told against the appellant as it went to show that 'he was bold enough to refuse to sign'. The judge should have but did not recognize that such a refusal was equally open to the inference that the alleged incriminating replies made by the appellant might have been the result of inducement or threat.

(4) The appellant's alleged confession ought to have been excluded having regard to the oppressive circumstances under which it was

made. The judge should have concentrated on the methods adopted by Giam in questioning the appellant and the conditions under which that questioning was conducted rather than on whether the appellant was put in fear in order that a statement would result.

(5) Here, the improper admission of the alleged confession was gravely prejudicial to the appellant, and turned the scales against him and in consequence, a miscarriage of justice might well have occurred. Without evidence of the alleged confession, the case against the appellant was based upon suspicion and guess work and got nowhere near to establishing the essential ingredients of the offence for which he was convicted.

Per curiam:
It is still necessary for the court to be satisfied that the replies made by an accused person were voluntarily made if the accused repudiates a confession and the court finds that he did make the replies, because the onus on the prosecution of proving voluntariness remains with the prosecution, and does not shift merely because of the stance adopted by the defence.

[Bahasa Malaysia summary

Sepasukan pegawai polis yang diketuai oleh Insp Giam ('Giam') telah menyerbu sebuah rumah yang didiami oleh perayu dan dua tertuduh yang lain, kerana disyaki bahawa rumah itu digunakan untuk mengedar ganja. Di dalam sebuah bilik ('bilik itu'), yang perayu telah mengakui adalah biliknya, pihak polis telah menjumpai daun dan ranting kering yang disyaki merupakan ganja. Juga didakwa bahawa perayu telah mengaku bahawa semua barang di dalam bilik itu adalah kepunyaannya. Giam kemudiannya mengatakan bahawa beliau telah memberi amaran statutori kepada perayu di bawah s 37A Akta Dadah Berbahaya 1952 ('Akta itu') di dalam Bahasa Malaysia.

Perayu telah disabit atas suatu kesalahan di bawah s 39B(1)(a) Akta itu dan telah dihukum mati manakala dua tertuduh yang lain itu telah dibebas dan dilepaskan. Perayu telah mencabar kebolehterimaan jawapan-jawapan yang menunjukkan kebersalahannya yang dikatakan telah diberikan oleh perayu kepada soalan-soalan Giam atas tiga alasan berasingan:

(a) bahawa amaran statutori di dalam bentuk yang diperuntukkan tidak diberi kepada perayu seperti yang dikatakan oleh Giam;
(b) bahawa selain daripada jawapan-jawapan yang diberikan oleh tiga tertuduh itu kepada soalan untuk menentukan identiti mereka, tidak ada sebarang perbualan lain yang berlaku antara Giam dan tiga tertuduh itu; dan
(c) bahawa meskipun terdapat sebarang jawapan kepada soalan-soalan Giam yang menunjukkan kebersalahan perayu, semua itu tidak dibuktikan diberi secara sukarela.

Hakim perbicaraan telah mengadakan suatu perbicaraan di dalam perbicaraan dan pada penghujungnya telah menerima kenyataan-kenyataan itu. Perayu telah membuat rayuan. A

Diputuskan, membenarkan rayuan itu:

(1) Keterangan Giam mengenai apa yang dikatakan merupakan pengakuan salah itu tidak seharusnya diterima begitu sahaja tetapi hendaklah diteliti dengan cermat dan diuji berbanding dengan keterangan yang lain dan kebarangkalian kes itu. B

(2) Sungguhpun Giam memasuki bilik itu dengan pertolongan perayu yang telah memberinya kunci bilik itu, perayu tidak mengeluarkan kunci itu dari sakunya tetapi telah mengambilnya dari paku di tembok bilik tidur utama yang dapat dimasuki oleh ketiga-tiga tertuduh itu. Hakim yang arif tidak menyebut di dalam penghakimannya tentang kepentingan keterangan itu, yang mungkin menimbulkan kesangsian terhadap versi pendakwa mengenai apa yang telah dikatakan oleh perayu. Kegagalan hakim untuk berbuat demikian merupakan suatu salah arah kerana ketidakarahan dan mahkamah berpendapat bahawa beliau telah tersilap apabila memutuskan bahawa pihak pendakwa telah membuktikan sehingga tidak ada keraguan yang munasabah bahawa perayu telah memberi pengakuan yang dikatakan itu kepada Giam. C D E

(3) Hakim perbicaraan telah membuat kesilapan apabila memutuskan bahawa pengakuan salah perayu itu telah diberi secara sukarela atas sebab-sebab berikut:

(a) apabila memutuskan isu kebolehterimaan pengakuan salah oleh seseorang tertuduh, beban tidak terletak pada tertuduh untuk menunjukkan bahawa ia tidak dibuat secara sukarela tetapi ianya terletak pada pendakwa untuk membuktikan sehingga tidak ada keraguan yang munasabah bahawa pengakuan salah itu dibuat secara sukarela. Hakim di dalam kes ini telah membalikkan beban itu dan mengabaikan keperluan bahawa pendakwa mesti membuktikan sehingga tidak ada keraguan bahawa pengakuan salah itu dibuat secara sukarela; F G

(b) apabila menentukan sama ada sesuatu pernyataan yang dibuat oleh tertuduh telah diperolehi akibat daripada ketakutan akan kemudaratan atau atas harapan mendapatkan sesuatu faedah yang digunakan atau dikemukakan oleh seorang berkuasa, perkara penting yang harus dipertimbangkan bukanlah keadaan akal fikiran pegawai polis tetapi keadaan akal fikiran tertuduh. Apabila memutuskan bahawa perayu 'hendaklah menunjukkan bahawa beliau ditakutkan supaya membuat pernyataan itu' dan 'perayu tidak berada dalam jenis ketakutan yang diperlukan oleh undang-undang untuk mengecualikan pernyataan itu', hakim telah mengecualikan dari pertimbangannya, keadaan akal fikiran perayu, dengan semua H I

kelemahan dan ketabahannya yang begitu penting dan sebaliknya hanya menumpukan perhatiannya kepada niat Giam; dan

(c) hakim telah memutuskan bahawa keengganan perayu untuk menandatangani kertas atas mana Giam telah mencatatkan jawapan-jawapan yang dikatakan telah diberi oleh perayu memburukkan kes perayu kerana ia menunjukkan bahawa 'beliau begitu berani sehingga enggan menandatanganinya'. Hakim sepatutnya tetapi tidak menyedari bahawa keengganan itu juga terbuka kepada inferens bahawa jawapan-jawapan yang menunjukkan kebersalahannya yang dikatakan telah dibuat oleh perayu mungkin hasil daripada dorongan atau ancaman.

(4) Pengakuan salah yang dikatakan telah dibuat oleh perayu seharusnya dikecualikan, memandangkan keadaan menindas di bawah mana ianya dibuat. Hakim seharusnya menumpukan perhatiannya kepada cara-cara yang digunakan oleh Giam apabila menyoal perayu dan keadaan di bawah mana soal siasatan itu dijalankan dan bukan menanya sama ada perayu telah ditakutkan supaya pernyataan itu dihasilkan.

(5) Di sini, penerimaan pengakuan salah yang tak wajar itu sangat memudaratkan perayu dan memberatkan timbangan terhadapnya dan oleh kerana itu, salah laksana keadilan mungkin telah terjadi. Tanpa keterangan mengenai pengakuan salah yang dikatakan telah dibuat oleh perayu itu, kes terhadap perayu bergantung kepada kesangsian dan tekaan dan tidak sama sekali dapat membuktikan unsur-unsur kesalahan untuk mana beliau telah disabitkan.]

Per curiam:

Mahkamah masih perlu berpuas hati bahawa jawapan yang telah diberi oleh seseorang tertuduh dibuat secara sukarela jika tertuduh menafikan pengakuan salah itu dan mahkamah berpendapat bahawa tertuduh sememangnya telah membuat pengakuan salah itu, kerana beban membukti tetap terletak pada pendakwa untuk menunjukkan bahawa pengakuan itu telah dibuat secara sukarela, dan beban itu tidak bepindah hanya disebabkan oleh pendirian pihak pembela.]

Notes

For cases on the voluntariness of a confession statement, see 7 *Mallal's Digest* (4th ed) paras 381–401.

Cases referred to

1 *PP v Lai Pong Yuen & Ors* [1968] 1 MLJ 12 (refd)
2 *R v Thompson* [1893] 2 QB 12 (refd)
3 *Sarwan Singh v State of Punjab* AIR 1957 SC 637 (refd)
4 *PP v Thum Soo Chye* [1954] MLJ 96 (refd)
5 *Ibrahim v R* [1914] AC 599 (refd)
6 *Wong Kam-Ming v R* [1980] AC 247; [1979] 2 WLR 81; [1979] Crim LR 168 (refd)

7 *R v Richards* 51 Cr App R 266; [1967] 1 All ER 829; [1967] 1 WLR 653 (refd)
8 *R v Northam* 52 Cr App R 97; [1968] Crim LR 104 (refd)
9 *Dato Mokhtar bin Hashim v PP* [1983] 2 MLJ 232 (refd)
10 *R v Priestly* 51 Cr App R 1; [1966] Crim LR 507 (refd)
11 *R v Prager* [1972] 1 WLR 260; [1972] 1 All ER 1114 (refd)
12 *R v Fulling* [1987] 2 All ER 65; [1987] QB 426; [1987] 2 WLR 923 (refd)

Legislation referred to
Evidence Act 1950 s 32(b)

Appeal from: Criminal Trial No 47–6–89 (High Court, Shah Alam)

Karpal Singh (*Karpal Singh & Co*) for the appellant.
Ng Aik Guan (Deputy Public Prosecutor) for the respondent.

Edgar Joseph Jr SCJ (delivering the grounds of judgment of the court): The appellant, together with Johar bin Johan and Rahmat bin Sukairman, were jointly prosecuted in the High Court at Shah Alam upon the following charge:

> That you, on 30 December 1988 at about 5am, at house no 254, Jalan Jasa 25, Taman Jasa, Batu Caves, Selayang, in the District of Gombak, in the state of Selangor Darul Ehsan, were found in possession of a dangerous drug, ie 'cannabis', to wit, 31.19432kg, and that you have accordingly committed an offence under s 39B(1)(a) of the Dangerous Drugs Act No 30/52 punishable under s 39B(2) of the same Act.

In the event, the appellant was convicted and sentenced to death but the two other accused persons were both acquitted and discharged. Against that conviction he had appealed.

According to the evidence led by the prosecution, acting on information received, a team of ten detectives, led by Insp Giam Kar Hoon ('Giam') raided a dwelling house known as 254, Jalan Jasa, Taman Jasa, Batu Caves, Kuala Lumpur ('the house'), on 30 December 1988 at about 5am.

On arrival at the house, they found that the front grill door was not locked though the front wooden door was.

Giam knocked on the door and, at the same time, shouted, identifying himself, but no one opened the door, so one of his men — DC Gulam ('Gulam') — kicked open the door.

On entering the house, the police party found that it was in complete darkness, and lying on the floor in the hall, on mattresses, still asleep, were the accused persons Johar and Rahmat. Giam noticed that the light in the master bedroom was switched on. Gulam then switched on the hall lights. The appellant then opened the front bedroom door and took a look. As he did so, Cons Zainal held the appellant and pulled him out. Giam walked into the room and found that that no one was in it. He then came out and, on his instructions, the appellant was promptly handcuffed to the accused Johar, while the accused, Rahmat, was handcuffed separately.

A It was at this point of time that Giam told the three accused persons that the house had been raided on suspicion that it was being used for the trafficking in ganja.

Whilst Cons Vijayan ('Vijayan') stood guard over the three accused persons, Giam administered the statutory caution under s 37A of the Dangerous Drugs Act 1952 ('the Act') in Bahasa Malaysia, to them. Each B confirmed that he understood the statutory caution. Giam then obtained the personal particulars of the three accused persons. As he took down those particulars, Gulam called out saying that the door to the second bedroom (bilik dua) was locked. Giam queried the three accused persons as to who slept in that bedroom but they made no reply.

C So, Giam knocked on the door of the second bedroom, at the same time asking whoever was inside to open the door, yet there was no reply. Giam then attempted to force an entry by kicking the door open. Having failed with his first kick, he was preparing to give it a second kick when he heard someone shout out — it might be thought, somewhat obligingly — 'saya punya' ('it is mine'). Giam queried Vijayan as to who this was and Vijayan D replied that it was Hasi, that is to say, the appellant. Giam then asked the appellant for the key and the appellant went into the master bedroom, dragging Johan with him, took down what was described by the judge as a 'bunch of two keys' from a nail on the inside of the door to the master bedroom, which he handed to Giam who then used it to open the door to E the second bedroom.

Giam then entered the second bedroom and the three accused persons were taken into that room. It was dark, so Giam switched on the lights. He saw that next to the wall was a large travelling bag bearing the brand name 'Elegeant', being exh P24, with its zip open. On examining the bag, he found that it contained 15 slabs of compressed leaf material neatly wrapped F in plastic with adhesive tape — four of these slabs being wrapped in Thai newspaper. He also noticed, that next to the bag, was a large cardboard box. On examining this, he found in it a smaller cardboard box bearing the brand 'Tea Kettle', which in turn contained a weighing machine, three rolls of tape and rubber bands, blades and pieces of brown paper of uniform size G which matched the brown paper found in the third bedroom. Within close proximity of the large cardboard box, Giam also noticed an open blue plastic bag, containing dried leaf material and, next to this, was a black plastic bag containing dried twigs. He suspected that the leaves and twigs were ganja.

Addressing the three accused persons, Giam asked them as to whom all H these belonged, and the appellant, it was said — and, again, we felt compelled to interpolate — somewhat obligingly replied: 'Semua barang dalam bilik ini adalah saya punya' ('all the things in this bedroom are mine'). This was a crucial piece of evidence (relied upon by the judge), since, if true, and provided the plant material was proved to be cannabis I within the meaning of s 2 of the Act and of sufficient weight, having regard to s 37(da) of the Act, it could, in principle, be sufficient by itself to support the conviction though the rule of prudence requires corroboration. (Per Ismail Khan J (as he then was) in *PP v Lai Pong Yuen & Ors*[1]). We shall be returning to this point later on in this judgment.

Giam continued his search and, in the third bedroom, he found sheets of brown paper scattered on the floor. While on a table in the dining room, he found part of a Tamil newspaper on which lay some dry leafy material, suspected to be cannabis and a bunch of two keys — one fitting the front grill door and the other a Toyota car parked under the porch. In the front room, he found nothing incriminating.

Giam then searched the Toyota car, but apparently found nothing incriminating. When queried by Giam as to whose car it was, the appellant replied: 'Saya punya kereta. Saya beli dari kawan saya sudah bayar lapan ribu ringgit.'

All the three accused persons were present at all stages of the search and, at the conclusion thereof, were brought back into the house. While Vijayan left for the police station at Selayang to fetch the police photographer, Giam picked up a piece of paper from the dining table and wrote on it what was allegedly said by the appellant, at the time he was about to kick the door of the second bedroom, the second time, and when the appellant was asked, to whom the articles in the second bedroom belonged. In the presence and hearing of Johar and Rahmat, Giam then read over what he had written on the paper (exh P21) to the appellant, who was requested to sign it. The appellant then asked Giam if it would be used in court to which question Giam replied, it may or may not. The appellant then refused to sign it.

The police photographer then arrived and took photographs of the various exhibits in situ as well as further photographs of these when the contents were taken out. After that, Giam prepared a search list and recorded therein a description of the various exhibits recovered and where they were recovered from. Having explained to the three accused persons the contents of the search list, they were requested to sign it and they all did so. That search list was produced in court and marked P20. The judge drew attention to the fact that item 4 in the search list specifically referred to 'the bunch of two keys' one of which had been used to open the second bedroom and that it was recovered by the appellant from the master bedroom and handed to Giam.

It would be convenient if, at this stage, we referred to the challenge mounted by the defence to the admissibility of the alleged incriminating replies made by the appellant to the questions put by Giam hereinbefore mentioned. That challenge was based on three separate grounds, to wit:

(1) that no caution in the statutorily prescribed form, as alleged by Giam, or at all, had been administered to the appellant;
(2) that apart from the replies made by the three accused persons to questions to establish their identities, no conversation of any sort had taken place between Giam and the three accused persons or any of them; and
(3) that in any event, if any incriminating replies had been made by the appellant, to the questions put by Giam, they were not proved to have been voluntarily made.

That challenge by the defence to the admissibility of the impugned evidence led to the judge holding of a trial within a trial at the conclusion of which the judge admitted the same.

Clearly, the challenge mounted by the appellant was threefold; apart from taking the caution point, he was *repudiating* the replies attributed to him. He was also contending, by way of alternative, that if the court found that he did make those replies, then they were not voluntarily made. In other words, he was *retracting* those replies.

We had considered the question of law, whether if an accused person repudiates a confession, and the court finds that he did make the replies, it is still necessary for the court to be satisfied that the replies were voluntarily made. In our view, it is still necessary, because the onus on the prosecution of proving voluntariness remains with the prosecution, and does not shift merely because of the stance adopted by the defence.

As for the grounds for his holding that Giam must have administered the statutory caution under the Act to the three accused persons, and that pursuant thereto, Giam must have questioned them, and that as a result, the appellant must have made the alleged confession to Giam by way of replies to those questions, the judge said this:

> There was no dispute that a very large quantity of cannabis had been recovered from bilik dua, and a smaller quantity from the dining room table. It was also not in dispute that Giam was the only person in the police team who was of the rank of Inspector. Everybody else was below that rank. Consequently, only a statement made to Giam or in his hearing was admissible in evidence provided the necessary statutory pre-conditions were satisfied under s 37A of the Act.
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> Giam and Vijayan gave evidence on this aspect of the trial. They were both unshaken in cross-examination. Hasi, Johar and Rahmat all gave evidence. They contradicted Giam on all material points of his testimony.
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> I had no hesitation in rejecting their evidence because it was inherently incredible that being the leader of the police party and the only person of Inspector's rank, Giam would not have done everything he reasonably could to flush out the drugs in the house and the person or persons linked with it. I hold that Giam must have questioned the three accused and bearing in mind his familiarity with the statutory requirements he must have given the caution which he knew by heart.
>
> That he (the appellant) did make the statement is proven by the fact that there was no reason whatsoever for Giam to fabricate a case against Hasi (the appellant) alone.

The judge failed to recognize that because Giam would not have failed to do everything he reasonably could to flush out the drugs and the persons he *thought* might be linked to them, Giam might have considered it his duty to obtain a confession from the appellant. And why did Giam pick on the appellant? The judge thought that this was a point which told strongly in favour of Giam. Lest we forget, it was the appellant who fetched the key to the second bedroom (from where the drugs were recovered) and handed it to Giam. The appellant was thus a natural target for Giam's attention. It would also be natural for Giam, as the investigating officer in the case, to

ensure that his efforts did not go down the drain. That being so, Giam's testimony as to the alleged confession made by the appellant could not be accepted at its full face value but had to be scrutinized with great care and tested against the rest of the evidence and the probabilities of the case. A

So far as the appellant's plea of repudiation of the alleged replies to Giam attributed to him was concerned, we did not consider that the judge should have looked at it askance, as he undoubtedly did. B

To recaptulate, according to Giam, upon being informed by Gulam, that the door to the second bedroom was locked, he asked the three accused persons, who slept in it, but they all remained silent. Giam then knocked on the door but received no response. He then attempted to force the door open by kicking it, but failed. Next, he was about to kick it again, when the appellant allegedly replied 'saya punya' ('it is mine'). C

A little later, with the help of a key which the appellant obtained from the master bedroom (it was hanging on a nail in the wall), Giam gained entry into the second bedroom and there recovered, inter alia, the offending exhibits. Giam then asked all the three accused persons to whom the offending exhibits belonged, and luck seems to have been on the side of the prosecution because it was alleged that, at that point of time, the appellant obligingly replied: 'Semua barang dalam bilik ini pun adalah saya punya' ('All the things in this room are mine'). D

It is relevant to consider what the situation was at that stage of the police raid. At the time the police had arrived, the three accused persons were found in the house in the circumstances outlined above. The tenant of the premises was not the appellant but the accused, Johar, and as such, in law, it would be he who had exclusive possession of the house, and therefore, the right of access to the second bedroom. True it is that Giam gained access to the second bedroom with the help of the appellant who handed him the key, and this appears to have left the judge with the impression that the appellant had a much more difficult case to meet than the other accused persons. E F

However, the appellant did not take the key out of his pocket, but lifted it from the nail in the wall of the master bedroom, to which all the three accused might have had access. It would therefore be wrong to infer from the fact that because the appellant had handed the key to the second bedroom, he must have been in possession or control of the offending exhibits found there since other inferences in his favour could also have been drawn. G

We are thus reminded of what was said in *R v Thompson*,[2] a case decided in the Court of Crown Cases Reserved, where the court was comprised of Coleridge CJ, Hawkins J, Wills J, Day J and Cave J — all judges with very extensive experience in the administration of criminal justice. Delivering the judgment of the court, Cave J said this (at p 17): H

> I would add that for my part I always suspect these confessions, which are supposed to be the offspring of penitence and remorse, and which nevertheless are repudiated by the prisoner at the trial. It is remarkable that it is of very rare occurrence for evidence of a confession to be given when the proof of the prisoner's guilt is otherwise clear and satisfactory; but, when it is not clear and I

A satisfactory, the prisoner is not unfrequently alleged to have been seized with the desire born of penitence and remorse to supplement it with a confession; — a desire which vanishes as soon as he appears in a court of justice.

It is true that the judge painstakingly recounted the testimony given before him during the trial within a trial to determine the admissibility of the B appellant's replies and then found, as a fact, that following the prescribed caution, the replies attributed to the appellant were made by him, voluntarily and that they were true. But nowhere in his judgment did he even mention the significance of that evidence; namely, the matters to which we have just referred regarding this part of the case, which had troubled us not a little and made us suspicious of the prosecution's version as to the alleged replies C by the appellant which, to put it mildly, seemed to us, too good to be true. We considered that the judge's failure to do so was a misdirection by way of non-direction. We were therefore of the view that the judge was wrong in holding that the prosecution had proved beyond reasonable doubt that the appellant did make the alleged confession attributed to him.

D That would have been sufficient to have disposed of the confession point in favour of the appellant but we went further and considered the question whether, assuming that the appellant had made the alleged confession, as Giam insisted he had, the prosecution had proved it to have been made voluntarily.

Now, an appellate court is entitled to interfere with a finding of fact E relating to the voluntariness of a confession if that finding has been arrived at without applying the true and relevant legal tests and consideration of relevant matters (see *Sarwan Singh v State of Punjab*;[3] and *PP v Thum Soo Chye*[4]).

The judge decided this question in favour of the prosecution and his F reasons for doing so appear in the following passages in his grounds of judgment:

> Admittedly the forced entry into the house at dawn, the rude awakening by the police, the handcuffing of the accused, and their probable knowledge of the presence of cannabis in the house must have brought about an instant realization that they were in peril of their lives. However it is my view that fear produced by G a surprise ambush is not enough to make a statement involuntary. *However frightened the target of a police raid may be from extraneous causes to exclude a caution statement on the ground that he was put in fear, he must show that he was put in that fear in order that the statement should result.*
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> *That Hasi was not in the sort of fear the law requires to exclude his statement is proved by the fact that he was bold enough to refuse to sign it. That he did make the* H *statement is proven by the fact that there was no reason whatsoever for Giam to fabricate a case against Hasi alone.*
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> Consequently I had no hesitation in ruling that Hasi's statement to Giam be admitted in evidence. (Emphasis added.)

In our view, these directions by the judge to himself, on the issue of I admissibility, were fatally flawed on no less than three separate grounds:

First, it is a fundamental principle of our criminal law that in deciding on the issue of admissibility of a confession made by an accused person, the onus is not on the accused to show involuntariness but on the prosecution

to prove beyond any reasonable doubt that the confession was voluntary. (See eg *Ibrahim v R*;[5] *Wong Kam-Ming v R*[6]). In holding, as he did in fact hold, that 'the accused must show that he was put in fear in order that the statement should result', the judge had reversed the onus and disregarded the requirement that the prosecution must prove beyond any reasonable doubt that the confession was voluntary.

Secondly, it is also a fundamental principle of our criminal law, that in deciding whether or not a statement made by an accused person was obtained from him either by fear or prejudice or hope of advantage exercised or held out by a person in authority, the cardinal point, is not so much the state of mind of the police officer (in this case Giam) but that of the accused (in this case the appellant). In holding that the appellant 'must show that he was put in that fear in order that the statement should result' and 'that Hasi (the appellant) was not in the sort of fear the law requires to exclude his statement', the judge excluded from his consideration, the state of mind of the appellant with all its foibles and fortitudes, which was most material and, instead, confined his attention, to the intention of Giam.

So, for example, in *R v Richards*,[7] Winn LJ said, inter alia, this (at pp 268 –269):

> Whatever be the nature of the inducement so made and however trivial it may seem to the average man to have been, such an inducement will be at least capable of rendering the statement then made inadmissible; it will have that effect unless in a given case it becomes plain beyond a reasonable doubt that it did not operate at all upon the mind of the person to whom it was made.

Similarly, in *R v Northam*,[8] the same learned Lord Justice said, inter alia, this (at p 104):

> ... It is not the magnitude, it is not the cogency to the reasonable man or to persons with such knowledge as is possessed by lawyers and others which is the proper criterion. It is what the average, normal, probably quite unreasonable person in the position of the (suspect) at the time might have thought was likely to result to his advantage ...
>
> The court realizes that this is imposing yet one more clog upon the efficient performance by the police of their duties ... but the court does feel bound to say that here there was an inducement, within the meaning that that word has been given in a long series of decisions, capable of influencing the mind of this appellant, albeit he himself appears to have misunderstood the nature of the inducement which was being offered to him. In a sense he was self-induced by a mistaken view, but not a view which it is impossible that he could honestly have formed ...

Thirdly, turning to the facts, the judge held that the refusal of the appellant to sign the paper upon which Giam had recorded the replies allegedly made by the appellant to Giam's questions, told against the appellant, as it went to show 'that he was bold enough to refuse to sign.' The judge should have, but did not recognize, that such refusal was equally open to the inference that the alleged incriminating replies made by the appellant (assuming they had been made at all) might have been the result of inducement or threat. Especially is this so, since the judge was considering a question of admissibility of alleged incriminating replies by an accused person, in handcuffs, to a

police officer, who had arrested him, in the course of a raid, and given the circumstances outlined above, when the accused must have been in a distraught state and under severe anxiety and mental strain.

Had he directed himself in that way, he would inevitably have excluded the appellant's alleged incriminating replies, since it is elementary that where a proved or admitted fact is equally open to two inferences, that in favour of the accused should be adopted. But, the judge did nothing of the sort, and in consequence, he, in effect, gave the benefit of the doubt on the point at issue, to the prosecution.

On a further ground also, the judge ought to have excluded the appellant's alleged confession having regard to the oppressive circumstances under which it was made (assuming for one moment that it was made at all). There is high authority for the proposition that the 'voluntariness' test has been expanded to include within its ambit, statements which are rendered inadmissible by reason of the fact that they were obtained under oppressive circumstances. It is true that the provisions of proviso (a) to s 37A(1) of the Act which repeat s 24 of the Evidence Act 1950, do not provide for this as a ground for excluding a confession by an accused person, but the authority to which we shall be referring in a moment, appears to have incorporated the common law.

In *Dato Mokhtar bin Hashim v PP*,[9] a decision of the Federal Court, the court found that the trial judge was wrong in failing to exclude the statement made by the accused because it was the result of prolonged periods of questioning ranging into the small hours of the morning which 'appeared to be suggestive of oppression.' In so holding, the court applied the definition of oppression propounded by Sach J in *R v Priestley*[10] as 'something which tends to sap and has sapped that free will which must exist before a confession is voluntary', which was adopted in *R v Prager*.[11]

We also note that in *R v Fulling*,[12] a Court of Appeal decision, Lord Lane CJ held that oppression must be given its ordinary dictionary meaning and applied the definition of that word as it appears in the *Oxford Dictionary* which says this:

> Exercise of authority or power in a burdensome, harsh or wrongful manner, unjust or cruel treatment of subjects, inferiors, etc; the imposition of unreasonable or unjust burdens.

His Lordship went on to add that the court 'finds it hard to envisage any circumstances in which such oppression would not entail some impropriety on the part of the interrogator'.

In the instant appeal, the judge failed to recognize that psychological oppression can be more insidious than, and just as effective, as physical pressure on a suspect who in many cases will be incapable of evaluating its effect upon him and not sufficiently articulate to explain the circumstances and effect to the court. In this context, the judge should have, but did not recognize, that the technique adopted by Giam in questioning the appellant soon after he had been forced out of his bed where he had been sound asleep, during the early hours of the morning, and while handcuffed, could have implied some impropriety on the part of Giam, however slight. We hasten to add, however, that in all probability, Giam in his zeal to collect evidence, did not realize that his actions might later attract judicial criticism.

The judge should therefore have concentrated on the methods adopted by Giam in questioning the appellant and the conditions under which that questioning was conducted rather than on whether the appellant was 'put in fear in order that a statement would result'.

Having decided that the alleged confession by the appellant was wrongly admitted, we had to consider the further question whether, on a fair consideration of the rest of the evidence, which was purely circumstantial, the improper admission of the alleged confession, had turned the scale against the appellant. We were satisfied that the improper admission of the alleged confession was gravely prejudicial to the appellant, did turn the scale against him and that, in consequence, a miscarriage of justice might well have occurred.

We would go further and say that without the evidence of the alleged confession, the case against the appellant was based upon suspicion and guesswork and got nowhere near to establishing the essential ingredients of the offence of which he was convicted, bearing in mind that the proverbial cap fitted not just the head of the appellant but that of the other accused persons Johan and Rahmat as well, who, it will be recalled, were also sleeping in the house at the time of the police raid. Certainly, the prosecution itself thought so, for why else should they have charged all three of them? Moreover, there was no evidence of common intention on the part of the three accused persons to commit the offence charged.

Before departing from this case, we would pause to mention that there was also considerable argument before us regarding the admissibility of the chemist's report which had been admitted under s 399 of the Criminal Procedure Code (FMS Cap 6). The evidence disclosed that the defence had pursuant to the provisions of the proviso to sub-s (iv) of s 399, given the three clear days' notice in writing to the prosecution, before the commencement of the trial, stating that they required the attendance of the chemist for cross-examination but the prosecution had not ensured the attendance of the chemist and that therefore, the chemist's report was inadmissible in evidence.

The prosecution's reply was that the chemist had migrated to Australia, and that therefore his report was admissible under s 32(b) of the Evidence Act 1950, which provides as follows:

> Statements, written or verbal, of relevant facts made by a person who is dead or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which under the circumstances of the case appears to the court unreasonable, are themselves relevant facts in the following cases:
>
> ...
>
> (b) when the statement was made by any such person in the ordinary course of business, and in particular when it consists of any entry or memorandum made by him in books kept in the ordinary course of business or in the discharge of professional duty; or of an acknowledgement written or signed by him of the receipt of money, goods, securities or property of any kind; or of a document used in commerce, written or signed by him, or of the date of a letter or other document usually dated, written or signed by him;
>
> ...

The reply of the defence to this contention by the prosecution was that there was insufficient evidence before the court, that the chemist had emigrated and that even if there had been evidence, there was insufficient evidence adduced by the prosecution to bring themselves within the exception to the hearsay rule embodied in s 32(b).

Having regard to the conclusion at which we had arrived on the admissibility of the alleged confession by the appellant, and its effect on the case for the prosecution, it is unnecessary for us to decide these other questions. Moreover, were we to do so, our decision would be obiter dicta.

In the result, so far from being 'a hopeless case' for the appellant, as the judge thought, the case for the prosecution was weak and improbable in the extreme. Accordingly, we allowed the appeal, quashed the conviction, set aside the sentence of death and substituted an order of acquittal and discharge.

Appeal allowed.

Reported by Prof Ahmad Ibrahim